

Title	Juvenile Law: Appeal on Placement Orders After Termination of Parental Rights (Welf. & Inst. Code, § 366.28) (adopt Cal. Rules of Court, rule 39.1C and rule 39.1D)
Summary	Proposed new rules 39.1C and 39.1D would implement Welfare and Institutions Code §366.28, which provides that placement orders for dependent children made after a termination of parental rights under Welfare and Institutions Code §366.26 are not appealable unless certain requirements are met.
Source	Family and Juvenile Law Advisory Committee Hon. Mary Ann Grilli, and Hon. Susan Huguenor, Co-chairs
Staff	Evyn Shomer, 415-865-7731, evyn.shomer@jud.ca.gov
Discussion	<p>Senate Bill 59 (Stats. 2003, chapter 247) added section 366.28 to the Welfare and Institutions Code. The section was enacted to reflect the finding of the Legislature that the delay caused by an appeal from a court order designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to the child. Existing law provides that, when the juvenile court terminates parental rights of a minor child, the court shall, at the same time, order the child referred to the state Department of Social Services or a licensed adoption agency for adoptive placement. The law also provides that no petition for adoption may be granted until the appellate rights of the parties have been exhausted (Welf. and Inst. Code, §366.26(j)).</p> <p>Welfare and Institutions Code section 366.28 will streamline the process for challenging the final adoption placement of a child after parental rights have been terminated. The law requires trial courts to defer to adoption placement decisions by a local child services agency pending the exhaustion of appeals rights, unless the agency abuses its discretion. The new code section will require shorter review of orders regarding local agency adoption placement decisions using the “substantive writ” process set forth in rule 39.1B of the California Rules of Court.</p> <p>Proposed rules 39.1C and 39.1D would conform to the new statutory requirements of Welfare and Institutions Code section 366.28. Rules 39.1C and 39.1D set forth the substantive writ process, which would be applicable to appeals from placement orders after termination of parental rights. Rule 39.1C provides the same procedural and timeline</p>

requirements as rule 39.1B.

The Appellate Advisory Committee, Appellate Rules Project Task Force, is currently renumbering and revising the appellate rules of the California Rules of Court in a series of installments. Current rule 39.1B was sent out for comment November 24, 2003, with comments received by January 23, 2004, as part of a larger proposal addressing revision to rules governing appeals and writs in juvenile cases, conservatorship and sterilization cases, and habeas corpus cases; petitions for supersedeas or temporary stay; and petitions for extraordinary writ and other original proceedings. That proposal separates rule 39.1B into two rules, proposed rule 38, *Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26* and proposed rule 38.1, *Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26*. More than 200 groups and individuals commented on this package. The task force is reviewing those comments and will make revision as appropriate. Therefore, the Judicial Council may adopt a revised version of rules 38 and 38.1 for an effective date of January 1, 2005.

Proposed rule 39.1C, *Notice of intent to file writ petition to review order designating the specific placement of a dependent child after termination of parental rights under Welfare and Institutions Code section 366.28* and rule 39.1D, *Writ petition to review order designating the specific placement of a dependent child after termination of parental rights under Welfare and Institutions Code section 366.28* are modeled on the proposed revision of current rule 39.1B. Revisions to proposed rules 38 and 38.1 will be considered when comments received on this proposal are considered.

There are some changes in proposed rules 39.1C and 39.1D that mirror the changes in proposed rules 38 and 38.1. These changes are as follows:

- Proposed rule 39.1C(e) is new. The case law generally recognizes that the reviewing courts may grant extensions of time under these rules for exceptional good cause. The provision is derived from existing rule 39.1A.
- Proposed rule 39.1C(f) is changed. Existing rule 39.1B declares that if a party was notified of the order setting the

hearing only by mail, the time to file a notice of intent to seek writ review was extended by five days, for a total of 12 days, from the date of the order setting the hearing. Revised rule 39.1C(f)(5) instead extends the filing period by five days from the date the notification was mailed. The purpose of this substantive change is to ensure that if mailing of the notification is delayed the party still has adequate time to prepare and file any notice of intent.

- Proposed rule 39.1C(h)(2), in the interest of completeness, specifies that the clerk's transcript must include, in addition to all relevant items listed in proposed rule 37.1(a), the notice of intent and the proof of service of that notice.
- Proposed rule 39.1D(a)(1) is new. It delineates the required elements of a writ petition filed under this rule.
- Proposed rule 39.1D(b) restates the current rule 39.1B(j) but conforms it to the requirements of case law and the relevant provisions of rule 14.
- Proposed rule 39.1D(e)(4) is new and requires the clerk to certify and send any supplemental transcripts to specified parties under rule 39.1C(g).

The text of the proposed rule is attached at pages 4-9.

SB 59 is attached at pages 10-11.

Attachments

Rule 39.1C and rule 39.1D of the California Rules of Court would be adopted, effective January, 1, 2005 to read:

Rule 39.1C Notice of intent to file writ petition to review order designating the specific placement of a dependent child after termination of parental rights under Welfare and Institutions Code section 366.28

(a) Application

Rules 39.1C–39.1D govern writ petitions to review placement orders following termination of parental rights entered on or after January 1, 2005. “Post-termination placement order as used in this rule refers to orders following termination of parental rights. Rule 56 does not apply to petitions governed by these rules.

(b) Purpose

The purpose of this rule is to facilitate and implement Welfare and Institutions Code section 366.28.

Delays caused by appeals from court orders designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to a dependent child.

The juvenile court intervenes in placement decisions made after parental rights have been terminated only in exceptional circumstances, and this rule is not intended to place additional authority or responsibility on the juvenile court.

(c) Who may file

The petitioner’s trial counsel or, in the absence of trial counsel, the petitioner, is responsible for filing any notice of intent and writ petition under rules 39.1C–39.1D. Trial counsel is encouraged to seek assistance from, or consult with, attorneys experienced in writ procedure.

(d) Petition form; JV-825

The petition for extraordinary writ may be filed on Judicial Council form Writ Petition—Juvenile (JV-825) or other petition for extraordinary writ. Petitions

1 for extraordinary writ submitted on Judicial Council from Writ Petition—
2 Juvenile (JV 825) shall be accepted for filing by the appellate court.

3
4 **(e) Extensions of time**

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6 The superior court may not order an extension of any time limit prescribed by
7 rules 39.1C–39.1D; the reviewing court may order extensions of time, but must
8 require an exceptional showing of good cause.

9
10 **(f) Notice of intent**

- 11
12 (1) A party seeking writ review under rules 39.1C–39.1D must serve and file
13 a notice of intent to file a writ petition and a request for the record.
- 14
15 (2) The notice must include all known dates of the hearing that resulted in the
16 order under review.
- 17
18 (3) The notice must be signed by the party intending to file the petition or, if
19 filed on behalf of the minor, by the attorney of record for the minor. The
20 reviewing court may waive this requirement for good cause based on a
21 declaration by the attorney of record explaining why the party could not
22 sign the notice.
- 23
24 (4) The notice must be served and filed within seven days after the date of the
25 order setting the hearing or, if the order was made by a referee not acting
26 as a temporary judge, within seven days after the referee’s order becomes
27 final under rule 1417(c). The date of the order setting the hearing is the
28 date on which the court states the order on the record orally or in writing,
29 whichever first occurs.
- 30
31 (5) If the party was notified of the order setting the hearing only by mail, the
32 notice must be served within five days after the date that the clerk mailed
33 the notice or within the time specified by (4), whichever is later.

34
35 **(g) Sending the notice of intent**

- 36
37 (1) When the notice of intent is filed, the superior court clerk must
38 immediately mail a copy of the notice to:
- 39
40 (A) each counsel of record;
- 41

1 (B) each party, including the minor, the parent, the present custodian of
2 a dependent child, any legal guardian, and any person who has been
3 declared a de facto parent and given standing to participate in the
4 juvenile court proceedings;

5
6 (C) the probation officer or social worker; and

7
8 (D) any court-appointed child advocate.

9
10 (2) The clerk must promptly send a copy of the notice and a proof of service
11 list to the reviewing court, by first-class mail or fax.

12
13 **(h) Record**

14
15 When the notice of intent is filed, the clerk must immediately:

16
17 (1) notify the reporter by telephone and in writing to prepare a reporter's
18 transcript of the oral proceedings at the hearing that resulted in the
19 order under review and deliver it to the clerk within 12 days after the
20 notice of intent is filed; and

21
22 (2) prepare a clerk's transcript that includes the notice of intent, proof of
23 mailing, and all relevant items listed in rule 37.1(a).

24
25 **(i) Sending the record**

26
27 When the transcripts are certified as correct, the clerk must immediately send:

28
29 (1) the original transcripts by the most expeditious method to the
30 reviewing court, noting the sending date on each original, and

31
32 (2) one copy of each transcript to each counsel of record and any
33 unrepresented party by any means as fast as United States Postal
34 Service express mail.

35
36 **(j) Reviewing court clerk's duties**

37
38 (1) The reviewing court clerk must promptly lodge the notice of intent.
39 When the notice is lodged, the reviewing court has jurisdiction of the writ
40 proceedings.

- 1 (2) The reviewing court clerk must promptly notify the parties when the
2 record is filed in that court, stating the date on which the 10-day period
3 for filing the writ petition under rule 39.1C-39.1D will expire.
4

5 **Rule 39.1D Writ petition to review order designating the specific placement of a**
6 **dependent child after termination of parental rights under Welfare and Institutions**
7 **Code section 366.28**
8

9 **(a) Petition**
10

- 11 (1) The petition must include:
12

13 (A) the identity of the parties;
14

15 (B) the date on which the superior court made the order setting the
16 hearing;
17

18 (C) the date on which the hearing is scheduled to be held;
19

20 (D) a summary of the grounds of the petition; and
21

22 (E) the relief requested.
23

- 24 (2) The petition must be liberally construed.
25

- 26 (3) The petition must be accompanied by points and authorities.
27

28 **(b) Contents of points and authorities**
29

- 30 (1) The points and authorities must provide a summary of the significant
31 facts, limited to matters in the record.
32

- 33 (2) The points and authorities must state each point under a separate heading
34 or subheading summarizing the point, and support each point by
35 argument and citation of authority.
36

- 37 (3) The points and authorities must support any reference to a matter in the
38 record by a citation to the record. The points and authorities should
39 explain the significance of any cited portion of the record and note any
40 disputed aspects of the record.
41

42
43 **(c) Time to file petition and response**

1
2 (1) The petition must be served and filed within 10 days after the record is
3 filed in the reviewing court.

4
5 (2) Any response must be served and filed:

6
7 (A) within 10 days after the petition is filed;

8
9 (B) if the petition was served by mail, within 15 days after the petition is
10 filed; or

11
12 (C) within 10 days after receiving a request for a response by the
13 reviewing court, unless the court specifies a shorter time.

14
15 **(d) Order to show cause or alternative writ**

16
17 If the court intends to determine the petition on the merits, it should issue an
18 order to show cause or alternative writ.

19
20 **(e) Augmenting or correcting the record in the reviewing court**

21
22 (1) Except as provided in (2) and (3), rule 37.2(d) governs augmentation or
23 correction of the record.

24
25 (2) The petitioner must serve and file any request for augmentation or
26 correction within five days after receiving the record; a respondent must
27 serve and file any such request within five days after the petition is filed.

28
29 (3) An order augmenting or correcting the record may grant no more than 15
30 days for compliance. The clerk and the reporter must give the order the
31 highest priority.

32
33 (4) The clerk must certify and send any supplemental transcripts as required
34 by rule 39.1C(g).

35
36 **(f) Stay**

37
38 A request by petitioner for a stay of the post-termination placement order will
39 not be granted unless the petition for extraordinary writ raises issues of
40 substantial complexity and adequate review requires extraordinary research
41 and analysis.

42
43 **(g) Oral argument**

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2 (1) The reviewing court must hear oral argument within 30 days after the
3 response is filed or due to be filed, unless the court extends the time for
4 good cause or counsel waive argument.

5
6 (2) If argument is waived, the cause is deemed submitted not later than 30
7 days after the response is filed or due to be filed.
8

9 **(h) Decision**

10
11 (1) Absent exceptional circumstances, the reviewing court should review the
12 petition and decide it on the merits by written opinion.

13
14 (2) The reviewing court clerk must promptly notify the parties of any
15 decision and must promptly send a certified copy of any writ or order to
16 the court named as respondent.

17
18 (3) If the writ or order stays or prohibits proceedings set to occur within
19 seven days or requires action within seven days—or in any other urgent
20 situation—the reviewing court clerk must make a reasonable effort to
21 notify the clerk of the respondent court by telephone, who must then
22 notify the judge or officer most directly concerned.

23
24 (4) The reviewing court clerk need not give telephonic notice of the summary
25 denial of a writ, whether or not a stay previously issued.
26

27 **(i) Right to appeal other orders**

28
29 This section does not affect the right of a parent, a legal guardian, or the child
30 to appeal any order that is otherwise appealable and that is issued at a hearing
31 held under section 366.26
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BILL NUMBER: SB 59 CHAPTERED
BILL TEXT

CHAPTER 247

FILED WITH SECRETARY OF STATE SEPTEMBER 2, 2003

APPROVED BY GOVERNOR SEPTEMBER 1, 2003

PASSED THE SENATE AUGUST 19, 2003

PASSED THE ASSEMBLY JULY 7, 2003

AMENDED IN ASSEMBLY JUNE 11, 2003

AMENDED IN SENATE APRIL 8, 2003

AMENDED IN SENATE MARCH 18, 2003

INTRODUCED BY Senator Escutia

JANUARY 15, 2003

An act to add Section 366.28 to the Welfare and Institutions Code,
relating to adoption.

LEGISLATIVE COUNSEL'S DIGEST

SB 59, Escutia. Dependent children: placement.

Existing law authorizes the juvenile court to determine the placement of children who are dependent children of the juvenile court.

This bill would provide that after parental rights have been terminated, an order that a dependent child is to reside in, be retained in, or be removed from a specific placement is not appealable, except as specified. The bill would also provide that this provision does not affect the right of a parent, a legal guardian, or the child to appeal any order that is otherwise appealable and that is issued at a hearing to terminate parental rights.

The bill would also require the Judicial Council to adopt a rule of court on or before July 1, 2004, to implement these provisions. The bill would provide that these provisions would become operative after the rule of court is adopted.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 366.28 is added to the Welfare and Institutions Code, to read:

366.28. (a) The Legislature finds and declares that delays caused by appeals from court orders designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to the child. The Legislature recognizes that the juvenile court intervenes in placement decisions after parental rights have been terminated only in exceptional circumstances, and this section is not intended to place additional authority or responsibility on the juvenile court.

(b) (1) After parental rights have been terminated pursuant to Section 366.26, an order by the court that a dependent child is to reside in, be retained in, or be removed from a specific placement, is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule of court, to substantively address the specific placement order that is challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(c) This section does not affect the right of a parent, a legal guardian, or the child to appeal any order that is otherwise appealable and that is issued at a hearing held pursuant to Section 366.26.

(d) The Judicial Council shall adopt a rule of court on or before July 1, 2004, to implement this section. This section shall become operative after the rule of court is adopted.